

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1995 SESSION

**FILED**  
April 12, 1996  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellant )  
 )  
 V. )  
 )  
 HAROLD E. FIELDS, )  
 )  
 Appellee )

NO. 01C01-9412-CC-00438  
WILLIAMSON COUNTY  
HON. DONALD P. HARRIS  
JUDGE  
(Driving under the influence -  
T.R.A.P 9)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

William M. Barker, Judge

## OPINION

We originally dismissed this interlocutory appeal as being improvidently granted. The Supreme Court has directed us to decide the appeal on the merits on remand.

The appellee was charged with driving under the influence by a Williamson County Grand Jury on November 8, 1993, following his arrest by Deputy George Poss of the Williamson County Sheriff's office on May 1, 1993. At the bench trial, Officer Poss testified that he observed the appellee's vehicle cross the solid white line on Interstate 65 in Williamson County four times as he observed the appellee driving his vehicle for about one mile. Once stopped, the deputy proceeded with investigating the circumstances of the appellee's erratic driving. The appellee was asked to get out of his car, which he did. The officer observed the appellee stagger or sway as he got out of his car and detected the odor of alcohol on the appellee. The appellee admitted to having a "couple" of beers earlier in the evening. According to Deputy Poss, the appellee failed the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. The appellee was arrested at 3:40 a.m. and taken to jail. Deputy Poss estimated that he arrived with the appellee at the jail at 3:50 a.m. Deputy Poss read and explained the implied consent form to the appellee. The appellee consented to submit to the test and signed the form at 4:03 a.m. The intoximeter test was performed at 4:10 to 4:12 a.m. The deputy testified that an estimated twenty minutes elapsed from the time he and the appellee arrived at the jail and when he gave the intoximeter test to the appellee. However, the deputy admitted that he did not maintain a continuous watch of the appellee during those twenty minutes. Although in the same room with the appellee, the deputy filled out paper work and entered data on a keyboard into the Intoximeter 3000 during the observation period. The officer testified that he did not hear any belching noises but that he had no independent recollection of asking the appellee if he had regurgitated, hiccupped, chewed gum or

engaged in any activity which would effect the validity of the breath alcohol test. The trial court found that because the deputy's times were mere estimates and the deputy failed to keep the appellee in his view for twenty minutes the results of the test could not be admitted. Our standard of review is whether the trial court abused its discretion in disallowing evidence of the results of the intoximeter test. See State v. West, 737 S.W.2d 790, 793 (Tenn. Crim. App. 1987).

The State first argues that the appellee waived any right to object to the admissibility of the test results because he failed to file a motion to suppress pursuant to Rule 12(b)(3) of the Tennessee Rules of Criminal Procedure. This issue is without merit. As the trial court correctly recognized, the objection to the use of this evidence at trial was not that it was illegally obtained. Rather, the appellee objected to the introduction of the results because the State had failed to lay a proper foundation for its introduction pursuant to State v. Sensing, 843 S.W.2d 412, 416 (Tenn. 1992). Accordingly, the appellee was not required to file a motion to suppress.

In State v. Sensing, our Supreme Court announced that in order for the results of the Intoximeter 3000 to be admissible through the testimony of an officer, the State must lay an appropriate foundation through the testing officer. Id. Sensing requires that the testing officer testify:

- (1) That the test was performed in accordance with the standards and the operating procedure promulgated by the forensic services division of the Tennessee Bureau of Investigation;
- (2) That he or she was properly certified in accordance with those standards;
- (3) That the evidentiary breath testing instrument used was certified by the forensic services division, was tested regularly for accuracy and was working properly when the breath test was performed;
- (4) That the motorist was observed for the requisite 20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate;

- (5) That he or she followed the prescribed operational procedure; and
- (6) That he or she identify the printout record offered in evidence as the result of the test given to the person tested.

Id.

More recently, in State v. Bobo, 909 S.W.2d 788, 790 (Tenn. 1995), our Supreme Court stated that its holding in Sensing had “relaxed the rigorous foundation requirements for the admission of the results of breath alcohol testing.” Sensing substitutes the six prerequisites to threshold admissibility enumerated above in lieu of requiring the State to introduce breath alcohol test results through the testimony of a certified operator who understands the scientific technology of the instrument. Id.; compare Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965)(setting forth pre-Sensing standard for admissibility). We conclude that in light of the relaxed standard for admitting breath alcohol test results, the threshold requirements for admissibility of such test results must be scrupulously followed.

This case centers on the question of whether the State met the requirement that prior to the test, the defendant was observed for the requisite twenty minutes, and during that time, the defendant did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate.

The twenty minute observation requirement of Sensing carries with it two distinct elements. The first is that the State must demonstrate that the defendant was observed for twenty minutes. An officer may not guess, estimate or approximate the amount of time the subject was under observation. The second element of the requirement is that the State must establish that the subject did not smoke, drink, eat, chew gum, vomit, regurgitate, belch or hiccup during the twenty minutes prior to taking the test. See Sensing at 417.

In State v. Billy Etroy McCaslin, No 02C01-9310-CC-00228 (Tenn. Crim. App., at Jackson, November 2, 1994), this Court found that where a portion of the requisite twenty-minute time period occurred while the officer was driving the subject to the police station, the observational period had not been met because the officer did not observe the subject as contemplated by the rule announced in Sensing. The rationale for the exclusion was that the testing officer could not say "with certainty that the defendant did not regurgitate while out of his view . . . ." Id.

In the case at bar, the trial court ruled the results of the breath alcohol test inadmissible based upon its finding that the officer could not say with certainty that the appellee did not regurgitate, hiccup or belch while out of the officer's view and because the officer could only estimate that the requisite twenty minutes had elapsed between the time they arrived at the jail and the time administered the test. Deputy Poss testified that although he did not turn his back to the appellee during the observation period, he also did not keep his eyes trained on the appellee during the entire period. While often a belch or regurgitation will produce a noise capable of being heard by another person, this is not always the case. That an officer remained in the room with the defendant for twenty minutes prior to testing will not satisfy the requirements of Sensing. Sensing requires the State to establish that during those twenty minutes nothing occurred which would compromise the validity of the breath alcohol test. Where an officer can testify that he or she continuously observed the test subject, with his or her eyes, for the entire twenty-minute observational period, the State will in almost all cases be able to meet this requirement of Sensing. This is not to say that there might not be other ways to make a sufficient showing. For example, the State might video tape the defendant for the twenty minutes prior to administering the test. In such a case, an officer could remain in the room with the defendant, attend to necessary duties prior to administering the test, and, upon

reviewing the video tape, be able to testify with certainty that the defendant did not silently or surreptitiously chew gum, belch, or regurgitate.

Deputy Poss did not continuously watch the appellee during the requisite twenty minutes prior to the test and could not testify with confidence that the appellee did not regurgitate, hiccup or belch during the twenty minutes prior to the test. Additionally, the officer could only estimate that twenty minutes passed between his arrival at the jail and when he gave the test to the appellee. Therefore, we hold as a matter of law that State failed to establish that the appellee was observed for the requisite twenty minutes prior to the test, and that during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate, as required by the rule announced in State v. Sensing. The trial court did not abuse its discretion by refusing to allow the results of the Intoximeter 3000 to be admitted against the appellee.

Accordingly, we affirm the ruling of the trial court and remand this case to the trial court for further proceedings consistent with this opinion.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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WILLIAM B. ACREE, JR., SPECIAL JUDGE